Ex parte JOHANNES CHOELDI & ORS.

[O. C. J. (Rigby J.) May 27, 1960]

[Penang — Originating Motion No. 5 of 1960]

Habeas Corpus — Members of Revolutionary Indonesian Organisation — Territorial waters — Detention, unlawful possession of firearms and ammunition.

Immigration — Immigration Regulations — Regulation 14 — Special Pass, overstaying duration of pass — Immigration Ordinance, 1952, s.33(1) — Controller of Immigration — Order of Removal.

This was an application for a Writ of *Habeas Corpus* to be directed to the Superintendent of Prisons, George Town, Penang to produce the 30 applicants before the Court with a view to their discharge.

The applicants who were members of a Revolutionary Indonesian Organisation bearing arms against the established Government of Indonesia were detained within the territorial waters of Malaya and subsequently charged and convicted for being in unlawful possession of firearms and ammunition. On appeal they were released as they had already served the substantive term of their imprisonment. They were then issued with Special Passes under Regulation 14 of the Immigration Regulations by which they were authorised to remain in the Federation for 10 days. At the expiration of this period the applicants (whose application for extension of time had been refused by the Minister of External Affairs) were detained for committing an offence under section 15(1) of the Immigration Ordinance.

Held: (1) it was not for the Court to decide whether or not the applicants had without reasonable cause overstayed the period of their pass because under section 15(4) of the Immigration Ordinance it was for the trial Court to decide that issue;

(2) the Controller in stating in the order of removal that the grounds for the issue of that order were that the applicants by overstaying the duration of their pass had committed an offence against section 15(1) of the Ordinance had prejudged the issue and unintentionally usurped the functions of a trial Court in deciding whether or not such offence had in fact been committed;

(3) although the Controller clearly had power to issue an order of removal under section 33 of the Immigration Ordinance and a subsequent order of detention under section 34, of the same Ordinance, the grounds which he stated in the order and upon which he had based his right to make the order were technically incorrect. The detention was thus unlawful.

Per Curiam: This is an application for a Writ of *Habeas Corpus*, and the applicants, in matters which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the Order which deprives them of that liberty.

ORIGINATING MOTION.

Jag-Jit Singh for applicants.

L. A. Massie, (Legal Adviser, Penang) for Controller of Immigration, Federation of Malaya.

Rigby J.: This was an application for a Writ of *Habeas Corpus* to be directed to the Superintendent of Prisons, George Town, Penang, to produce the 30 applicants before the Court with a view to their discharge. At the hearing of the application I granted an order *nisi* for the respondent to show cause why the order should not be made absolute, and an affidavit in reply was filed by the Controller of Immigration. Yesterday, after having heard the arguments of Counsel, I directed that the order be made absolute and the applicants be discharged from prison. In view of the practical interest and importance of the matter I intimated that I would give in writing the reasons for my decision. I now do so.

By their affidavit the 30 applicants declared themselves to be members of the Revolutionary Government of the Republic of Indonesia: the 1st applicant being attached to the staff of the Ministry of Defence and holding the rank of Lieut.-Colonel. They are members of a Revolutionary Indonesian Organisation bearing arms against the established Government of that country.

On the 5th January, 1960, they were found in a motor tongkang, and in possession of their arms, some distance off the coast of Province Wellesley and within the territorial waters of Malaya. Their motor tongkang was immobile at the time it was found. They were apprehended, brought to Penang and, in due course, charged with being in unlawful possession of firearms and ammunition. Upon these two charges they were tried and, on the 5th February, duly convicted. They were sentenced to a term of imprisonment. In addition to the term of imprisonment they were also fined sums of money in respect of both charges and, in default of payment of such fines, ordered to undergo further terms of imprisonment. The terms of imprisonment were ordered to run as from the date of their arrest, namely, the 5th January. The learned Magistrate further ordered not only the confiscation of their firearms and ammunition, but also the confiscation of the tongkang — and all movables contained therein — in which they were found at the time they were apprehended. They appealed against their convictions and sentences, including, of course, the confiscation orders. Their appeals were heard by this Court on the 5th May. After hearing the arguments of Counsel this Court, without prejudice to its final decision upon the validity or otherwise of the conviction itself, whilst upholding the substantive term of imprisonment imposed, set aside the fines imposed (and, by necessary implication, the terms of imprisonment in default of payment of such fines). As a result, since the applicants had served the substantive term of six months' imprisonment (allowing for the prescribed period of remission of prison sentences according to the Prison Regulations), they were released forthwith.

On the same day, the 5th May, the applicants were issued by the Controller of Immigration with Special Passes authorising each and every one of them to remain on the Island of Penang for a period of 10 days pending their departure from Malaya, and to report their departure to the Immigration Department. These Special Passes were issued to them by the Controller under the provisions of Regulation 14 of the Immigration Regulations. The grounds upon which they were issued and the reasons for issuing them, are not specified in the Passes themselves. But it is not unreasonable to

assume that they were issued to them pending the result of their appeal against conviction.

Now the defence which the applicants had put forward throughout their trial and which, through their Counsel, they continued to urge at the hearing of the appeal, was that they were within the territorial waters of Malaya not of their own volition but because the motor engine of their boat had broken down and they had consequently drifted to the position where they were, in fact, found. The learned Magistrate concluded, and in my view correctly, that if they were able to establish that defence it would, in law, afford a complete defence to the charges preferred against them. There was undoubtedly evidence that at the time their boat was found it was immobile. The applicants had at once told the Police that their engine had broken down, and a subsequent examination conclusively established that the self-starter of their motor engine would not function owing to the fact that a pipe connecting the compressor to the air vessel was fractured. There was, however, evidence called by the prosecution that the engine could be started by the independent and additional method of using the cranking handle and that, once started, the fractured pipe in no way affected the running of the engine itself. The applicants, perhaps unfortunately for them, did not choose to give evidence before the learned Magistrate as to the circumstances in which their engine had allegedly broken down and the attempts, if any, they had made to repair it, and why they had apparently not made use of the cranking handle. In the result the learned Magistrate, is a commendably careful and detailed judgment, held in effect that they had failed to discharge the onus of proof which was upon them to establish that they were, in fact, involuntarily within territorial waters because their engine had broken down. In dismissing their appeal I agreed with the view taken by the learned Magistrate. Apart from the issues of fact there were, however, additional grounds of appeal, some of which were of practical interest and importance.

If the applicants' appeal was allowed on the issues of fact involved, it followed that their plea that they had involuntarily come within territorial waters was valid, and they would presumably be allowed to leave the country in the same manner as they came in, namely, in their motor tongkang and in full possession of their firearms and ammunition. It is clear, therefore, that the result of their appeal against conviction was of vital importance to them.

On the 9th May, the applicants, through their Solicitor, wrote to the Minister of External Affairs referring to the 10 day Special Pass given to them within which to leave the country. The letter pointed out that the judgment against their convictions had been reserved and asked for an extension of the time of their departure until after the judgment had been delivered. That application was refused by the Minister.

On the 12th May, a further letter was sent by the applicants to the Minister, with a copy to the Controller of Immigration, repeating their request and stressing the nature and urgency of their application. No acknowledgment of, or reply to, that letter was received from the Minister. However, on the expiration of the period of the Special Pass no action was taken against them until the 18th May. I should interpose here that throughout the period of the previous 10 days their place of residence was disclosed to, and known by, the authorities. On the 18th May, they were served by the Controller of Immigration with an Order of Removal issued under section 33(1) of the Immigration Ordinance informing them that whereas they had been issued with a Special Pass under the provisions of Regulation 14 authorising them to remain in the Federation of Malaya for a period of 10 days, and whereas that period of 10 days had expired and each of them had remained in the Federation after the expiration of the said Passes, thereby committing an offence against subsection (1) of section 15 of the Immigration Ordinance, the Controller of Immigration, therefore, in exercise of the powers vested in him by subsection (1) of section 33 of the Ordinance, ordered their removal from the Federation. Consequent upon the issue of the Removal Order the applicants were removed to, and detained in, the Penang Prison.

The final paragraph of the Controller's affidavit filed in answer to this application states:—

"I am advised and verily believe that the said persons are lawfully detained under the said Order, the requirements of section 34(1) of the Immigration Ordinance not having been complied with in that I have not yet been able to make arrangements for the removal of the said persons or any of them from the Federation."

I have referred to the fact that where an Order of Removal has been made by the Controller, under section 34 of the Ordinance power is expressly given to him to order the detention in custody of the person to be removed for such period as may be necessary for the purpose of making arrangements for his removal. If the Removal Order is itself a valid Order then it follows that the detention in custody is also valid for the purpose — but only for the purpose — of making arrangements for removal. Conversely, it follows that if the Removal Order is invalid then the detention is itself unlawful.

The grounds upon which the Removal Order was made by the Controller were that by remaining in the Federation after the 10 day period Pass had expired the applicants had committed an offence against subsection (1) of section 15 of the Immigration Ordinance. Section 15(1) provides that:—

"15. (1) A person shall not remain in the Federation after the cancellation of any Permit or Certificate ..... unless he is otherwise eutitled or authorised to remain in the Federation under the provisions of this Ordinance or of any regulations made thereunder."

However, section 15(4) provides that:—

"Any person who without reasonable cause contravenes the provisions of subsection (1), (2), or (3) of

this section shall be guilty of an offence against this Ordinance."

Section 57 of the Ordinance specifies the penalty upon conviction — where no special penalty is provided for an offence against the Ordinance — as imprisonment for a term not exceeding six months or to a fine not exceeding $2,000, or to both such imprisonment and fine.

The learned Legal Adviser, Mr. Massie, said that the point at issue was whether or not the applicants had reasonable cause to overstay the period of their 10 day Pass, and he said that he was instructed to leave that matter for the Court to decide. He further conceded that if the Order of Removal was invalid then it followed that the Order of Detention was also invalid. Now if I considered that the proposition as put forward by Mr. Massie was correct and that it was simply for this Court to decide whether or not the applicants, without reasonable cause, had overstayed the duration of the 10 day Pass issued to them then, on the undisputed facts of this particular case, I would be disposed to say that it was not without reasonable cause that the applicants had overstayed the period of their Pass. But I do not accept the proposition that it is for this Court in these proceedings to decide whether or not the applicants "without reasonable cause overstayed the period of their Pass". Section 15(4) constitutes a specific offence rendering an offender liable to imprisonment and/or fine. Whether or not an offence had been committed under that subsection was for a trial Court to decide, upon hearing the evidence, and after a specific charge had been preferred in Court against the alleged offender. In my view, the Controller, in stating in the Order of Removal that the grounds for the issue of that Order were that the applicants, by overstaying the duration of their Pass, had committed an offence against section 15(1) of the Ordinance, had prejudged the issue and unintentionally usurped the functions of a trial Court in deciding whether or not any such offence had, in fact, been committed. In my view, the Order of Removal was, therefore, bad on that ground. It followed that the applicants were, therefore, unlawfully detained and that they ought to be discharged forthwith.

Before leaving this matter I would, however, again refer to section 33(1) of the Immigration Ordinance. That section provides that:—

"33. (1) Where the presence of any person in the Federation is unlawful by reason of the provision of section 15 or 60 such person shall, whether or not any proceedings are taken against him in respect of any offence against this Ordinance under that section, (the underlining is mine) be liable to be removed from the Federation by order of the Controller."

Reading that section in conjunction with section 15 it would seem to be clear beyond doubt that the continued presence of a person in the Federation after the cancellation of any Permit or Certificate granted to him is unlawful. Whether or not he has committed an offence by continuing to remain in the Federation depends upon whether or not he "without reasonable cause contravenes the provisions of sections 15(1), (2), or (3)." But wholly irrespective as to whether or not he has committed an offence for which he can be prosecuted, convicted and punished, his continued presence without permission in the Federation is unlawful and for that he is, under section 33, "liable to be removed from the Federation by order of the Controller." Such Order of Removal may properly be followed by an Order of Detention pending removal. In my view, on the facts of this case the Controller clearly had power to issue an Order of Removal under section 33 and a subsequent Order of Detention under section 34. The flaw which, in my view, vitiates the validity of the Removal Order made by him lies not in the fact that he exercised his undoubted right of making a Removal Order in the circumstances of this case, but that the grounds which he stated in the Order and upon which he based his right to make that Order, were technically incorrect. If the grounds stated by the Controller in his Order of Removal had been differently worded and had avoided the use of the words that the applicants, by overstaying the duration of their Pass, had committed "an offence" against subsection (1) of section 15, these proceedings might well have resulted in a different conclusion. The distinction, no doubt, is a highly artificial one. But this is an application for a Writ of *Habeas Corpus*, and the applicants, in matters which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the Order which deprives them of that liberty.

In my view, there is nothing to prevent the Controller, should he be so minded, from making a further Order forthwith for the removal of the applicants from the Federation on the ground that their continued presence in the Federation "is unlawful." Such Order of Removal may properly be accompanied by an Order for detention in custody "for such period as may be necessary for the purpose of making arrangements for their removal." But I would only add that having regard to the uncontradicted paragraphs in the applicants' affidavit that at the time when the Order of Removal was made which deprived them of their liberty, all arrangements had, in fact, been made by them to leave the Federation of Malaya, and bearing in mind that the purpose of the issue of the Removal and Detention Orders is to achieve the removal from Malaya of persons unlawfully in the country, it may well be that, in the exercise of his discretion, the Controller will wish to satisfy himself as to the efficacy and promptitude in execution of the applicants' own arrangements for their removal from the shores of this country, before he himself issues a further Removal and Detention Order.

It was for these reasons that I allowed this application, directed that the Order be made absolute, and the applicants accordingly discharged from prison, and directed that the respondent pay the taxed costs of this application.

Application allowed.